Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

In the

Supreme Court of the United States

MARIAN K. AGNEW,

Petitioner,

v.

THE SUSSEX CONDOMINIUM UNIT OWNERS ASSOCIATION,

Respondent,

On Petition for a Writ of Certiorari To the Supreme Court of the State of Virginia

APPENDIX

Marian K. Agnew
The Gloucester Apartments
1820 Park Avenue, Apt. 2
Richmond, Virginia 23220
(804) 359-8248

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Record No. 100843
Circuit Court No. CL08-5626
(entered November 15, 2010)

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 15th day of November, 2010.

Marian K. Agnew,
Defendant-Appellant,
v.
Sussex Condominium Unit Owners Association,
Plaintiff-Appellee

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 9th day on September, 2010 and grant a rehearing thereof, the prayer of the said petition is denied.

Patricia L. Harrington, Clerk
By: /S/ Deputy Clerk

Record No. 100843
Circuit Court No. CL08-5626
(entered September 9, 2010)

VIRGINIA:

In the Supreme Court of Virginia: held at the Supreme Court Building in the City of Richmond on Thursday the 9th day of September 2010.

Marian K. Agnew,
Defendant-Appellant,
v.
Sussex Condominium Unit Owners Association,
Plaintiff-Appellee

From the Circuit Court of the
City of Richmond

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

Patricia L. Harrington, Clerk
By: /S/Ebby Edwards, Deputy Clerk

Circuit Court No. CL08-5626
(argued October 2, 2009, before Judge Melvin R. Hughes Jr.)
(entered October 21, 2009)

Circuit Court of the City of Richmond

Re: CL0008-5626

The Sussex Condominium Unit Owners Association
v.
Marian K. Agnew, [and the Marian K. Agnew Revocable Trust][1]

Dear Counsel for the Sussex and Ms. Agnew,

You will recall this case which is before the Court on plaintiff's motion for summary judgment. The motion was argued on October 2, 2009 after which the court took the matter under advisement. After the hearing, Agnew has submitted two briefs (1) Post-Hearing Brief and Objection, filed October 6, 2009, and (2) Defendant's Second Post-Hearing Brief, filed October 19. Plaintiff has responded. Plaintiff's motion is based on the pleadings. It has also attached to its Memorandum in support defendant's answers to request for admission, interrogatories and production of documents.

The Court took the matter under advisement to read Quatannens v. Tyrrell, 268 Va. 360, 601 S.E. 2d 616 (2004) and Helms v. Manspile, 273 Va. 1, 671 S.E. 2d 127 (2009), two cases relied upon by plaintiff. Upon reading the cases, the Court will have to agree

[1] Dismissed retroactively:11-30-09 Order, R: 364-366.

with Plaintiff, they very nearly match what we have here. Qutannnens give a rather extensive discussion of adverse possession; the principle plaintiff relies on in its assertion that it owns the subject disputed real estate lying between the parties adjoining properties. The disputed property consists of a brick wall lying on the recorded parcel of defendant's land lying west of the recorded boundary line which plaintiff asserts it has acquired by adverse possession.

Quatannens observes, as is the case here, that questions of adverse possession "are fact specific and their resolution...turn on...one or two of the elements of adverse possession." Id. 268 Va. at 365. Here, the questioned elements are whether plaintiff's possession has been "adverse" or "hostile" and on a "claim of right." According to Helms, as to the element of claim of right, if present, the possession is adverse or hostile. Quoting Groppo v. Blanks, 241, Va. 58, 400 S.E. 2d 168 (1991) occupancy use equates to a claim of right. Id. 277 Va. At 8.

Here, an issue of mistake revolves around the construction of the brick wall on what the parties' predecessors in title believed was the property line dividing the adjoining properties. Indeed, the parties agree that defendant's predecessor now believes that in 1978, when the wall was to be constructed, plaintiff's predecessor tricked or deceived him into thinking that the wall was placed in a proper position on the boundary line. This raises the question whether adverse possession obtains when the parties act on the mistaken belief of where the boundary line is and the predecessor and his successors exert all the actions incident to ownership with respect to that which lies on the side of the wall claimed as acquired by adverse possession. Regarding mistaken belief in

these circumstances, the Court said:

> "When a claimant mistakenly believes that a particular 'line on the ground' represents the extent of his or her own land and treats all the land within the line on the ground as his or her own in a manner that satisfies the requirements of adverse possession - particularly actual, exclusive and visible possession then the hostility requirement is generally satisfied."

So, with all the elements of adverse possession in place and satisfied, plaintiff has established its right, title and interest in the disputed property consisting of the brick wall, etc. described in the papers.

Finally, there are two issues defendant has raised which need to be addressed. These have to do with the plaintiff's standing, which defendant initially raised but conceded later, and the question of tacking. After the concession on standing, defendant raised the question of continuity of plaintiff's possession or rather, the ability of the present plaintiff, an unincorporated association, to derive the benefit of adverse possession with it is not the same owner as the now defunct Sussex Corporation.

There is no issue over when the wall was built, 1978. The present plaintiff, through a corporation, Sussex, Inc., came into title, it contends in 1993 or 1994, the requisite fifteen years having elapsed. Plaintiff in the case is an association of condominium owners. Sussex, Inc., plaintiff's immediate predecessor in interest, was incorporated in 1979. In 2005, its corporate charter lapsed but by that time the 15 year requirement had been met. Virginia law

allows for tacking to establish adverse possession provided the successor adverse users are in privy with their predecessor's adverse users. In such cases, such a successor user can aggregate the periods of adverse ownership and assert title through adverse possession. I think the point defendant makes is that with the lapse in Sussex's corporate status in 2005, the plaintiff here cannot claim through adverse possession because it is not the same entity as Sussex, Inc. Both Quatannens and Helms recognize tacking under their respective facts. Each condominium owner owns their respective units and by virtue of Va. Code §§ 55.79.80, the association can maintain an action, as here, with respect to the common elements" of the condominium. In other words, the plaintiff here, the condominium association, is latest in a line of successive parties with privity through whom adverse possession can be justly claimed.

Lastly, defendant argues that since the 1978 transaction involving the placement of the brick wall involved a trick, as mentioned above, no adverse possession can lie. Quatannens answers this in that any fraud that may have been involved was induced by a unilateral mistake. It is covered by the Court's ruling on the effect of a mistake as to adverse possession discussed above.

Sussex counsel can provide an order sustaining the motion for summary judgment.

Very truly yours,
/S/
Melvin R. Hughes, Jr.

Circuit Court No. CL0800-5626-0
(argued October 2, 2009 before Judge Melvin R. Hughes.
(entered Nov. 12, 2009)

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

THE SUSSEX CONDOMINIUM UNIT OWNERS ASSOCIATION

Plaintiff,

v.

Marian K. Agnew and
[The Marian K. Agnew Revocable Trust][1]
Defendants.

ORDER

This matter came before the Court for a hearing on October 2, 2009, on the Motion for Partial Summary Judgment, regarding ownership of the property at issue, filed by the Plaintiff Sussex Condominium Unit Owners Association (the "Sussex"), and the Motion to Dismiss filed by Defendant Marian K. Agnew ("Agnew"), who is a retired member of the Virginia State Bar representing herself in this matter *pro se*.

Having considered pleadings, the briefing submitted by both sides before and after the hearing and the argument of counsel for the Sussex and of Agnew, IT IS HEREBY ORDERED that the Sussex's Motion for Partial Summary Judgment is GRANTED and that Agnew's Motion to dismiss is DENIED for the reasons stated in the Court's Letter Opinion of October 21, 2009.

---

[1] Dismissed: Order 11-30-09, R: 364-366

The Court FINDS, based on the pleadings and admissions, that ownership of the property at issue (the Wall and a small strip of land east of the Wall) passed to the unit owners of the Sussex by virtue of the doctrine of adverse possession in 1994, upon the running of the statutory period after the erection of the Wall in 1978 and the establishment of the Sussex condominiums in 1979. The Court further FINDS that the Sussex has demonstrated by clear and convincing evidence each of the elements of adverse possession, including that it possession of the property at issue has been adverse or hostile and under a claim of right (as evidenced by the Sussex's use and occupancy of the property) and for the statutory period. The Court further HOLDS that the Sussex is the appropriate party to have brought the claim of adverse possession.

The Court's Letter Opinion and this Order having disposed of Counts I and II of the complaint in the Sussex's favor, remaining in this case are Counts III and IV of the Sussex' Complaint, to the extent not resolved by the Court's Letter Opinion and this Order, and the appropriate relief to be awarded. The Court DIRECTS Agnew and counsel for the Sussex to confer on these matters and submit to the Court an appropriate Order or be prepared to discuss those matters and submit to the Court an appropriate Order or be prepared to discuss those matters at the pretrial conference scheduled for November 23, 2009 at 10:00 a.m.

Prior to the October 2, 2009 hearing, Agnew had also filed with the Court a Motion to dismiss the Sussex and to Add Sussex Unit Owners as Plaintiffs. As indicated in the Court's Letter Opinion, Agnew

conceded at the hearing that the Sussex has standing. Agnew's standing Motion is therefore DEEMED WITHDRAWN.

The Clerk shall send an attested copy of this Order to all counsel of record and any parties not represented by counsel.

("Defendant's exceptions noted. Endorsement
waived pursuant to Rule 1:13, /S/ MRH"
/S/ Melvin R Hughes, Judge

A copy teste: Bevill M. Dean, Clerk
by /S/ Donna Clythger, D.C.

Circuit Court No. CL0800-5626-0
(argued January 26, 2010.)
(entered February 3, 2010)

VIRGINIA:
IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

THE SUSSEX CONDOMINIUM UNIT OWNERS ASSOCIATION
Plaintiff,
v.
Marian K. Agnew, et al,
Defendants.

Before: MELVIN R. HUGHES, Circuit Court Judge

FINAL ORDER

On January 26, 2010, this matter came before the Court for trial on the remaining claims of trespass and conversion (Counts III and IV of the Sussex's Complaint) to the extent not resolved by the Court's prior rulings. The Court having considered the evidence and argument at the trial and having determined that no further briefing is required, in accordance with the Court's ruling from the bench at trial, IT IS HEREBY ORDERED as follows.

The Court FINDS that Mrs. Agnew trespassed on and converted the Sussex's property by tearing down part of the wall. The Court further FINDS that four

thousand nine hundred sixty dollars ($4,960.00), which is the total of the cost for repair of the wall ($4,392.00) and costs already incurred ($568.00 for recovery of bricks and erection of a temporary fence, is the appropriate measure of damages on the Sussex's claims.

Accordingly, the Court hereby ENTERS final judgment in favor of the Sussex [*against Marian K, Agnew, Defendant, (MAH)]* in the amount of five thousand ninety four dollars ($5,094.00), the above damages plus Plaintiff's costs of $134.00 (the $84.00 filing fee for this case plus $50.00 for service of the Complaint upon the two defendants) pursuant to Va. Code Sec. 17.1-601. Post-judgment interest on the principal amount of $4,960.00 as provided for in Va. Code Secs.8.01-382 and Sec.6.1-330.54, shall run from the date of entry of this Order.

THIS IS A FINAL ORDER

All objections and exceptions made at trial and in prior fillings are noted, and endorsements are waived in the Court's discretion pursuant to Rule 1:13.

The clerk shall send copies of this Order to Ms. Agnew and counsel for Plaintiff.

ENTER: 2/3/10
Melvin R. Hughes, Jr,
Judge

A Copy teste: Bevill M. Dean, clerk by CA Hargrove, D.C.

Circuit Court No. CL08-5626
(Letter Opinion Melvin R. Hughes, Jr., Judge)
(entered February 25, 2010)

Circuit Court of the City of Richmond

Sussex Counsel
[address]
Marian K. Agnew
1820 Park Avenue #2
Richmond, Virginia 23220

The Sussex Condominium Unit Owners Association
v.
Marian K. Agnew, and the Marian K. Agnew Revocable Trust

Dear Sussex Counsel and Mrs. Agnew,

This will acknowledge receipt on February 23, Ms. Agnew's Defendant's Motion to Rehear and Reconsider in connection with the above.

The motion recites and the court's record confirms that the final order was entered February 3, 2010, making the motion filed one day shy of the twenty-one days provided under Rule 1:1 after which the court can no longer exert jurisdiction. While timely filed before the twenty-one day time, Rule 4:15 provides that oral arguments on motions for reconsideration require approval by the court. Having reviewed the motion, the court considers that the rulings made should stand and there is no reason for oral argument on reconsideration.

Accordingly, I have this day entered an order denying the motion.

Exceptions are noted.

Very truly yours,
/S/
Melvin R. Hughes, Jr

Record- Plaintiff's Exhibits
November 8, 2002
Marian K. Agnew, Esq.
1818 Park Avenue, Apt.2
Richmond, VA 23220

Dear Marian,

In response to your June, 2002 letter, attached you will find a signed and notarized response of explanation relative to the creation and placement of the brick "wall' in question.

'The wall' was constructed during the summer of 1978 with the full knowledge and cooperation, including monetary, of Walter and Barbara Bass, the owners of the property you recently purchased, and the then owners of the Sussex.

Real estate guidance tell us that the "law of adverse possession" takes precedent after 15 years and after 20 years there is an 'easement of prescription.' Therefore, your offer of "temporary permission" to use 'the wall' seems to have come too late. And certainly your mention of just tearing it down would seem unfounded and ill-advised. Please understand that if you deliberately damage "the wall,"you will be responsible for costs associated with any repairs.

We would like to propose an agreement that if "the wall" should ever come down due to an unforeseeable and accidental situation, then the use of your property in accordance with the 'true boundary line' would resume. And we would like to condition that we will

make reasonable repairs to "the wall" to keep it in good condition, should that need arise.

We too are hopeful that this issue can be amicably resolved and we can continue to live as good neighbors in the historic Fan district.

Sincerely,

/S/

Lee Parker, President, Sussex Association

1814 Park Avenue, Unit 3

Richmond, Virginia 23220 Att. Certified Mail Return Receipt

SUSSEX 0039

Jeffery J. Rawn
1130 S. Michigan Ave.
Apt 3703
Chicago, IL 60605
312. 957.1003
rawns@earthlink.net

Mr. Lee Parker, President
The Sussex Association
1814-16 Park Avenue
Richmond VA 23220
Re: Brick wall on West property line at
1814-16 Park Ave.

Dear Lee,

In an effort to resolve an apparent property line dispute which has been brewing recently between Marian Agnew, the owner of 181-20 Park Ave., and The Sussex Association, the owner of 1814-16 Park Ave., each in Richmond, Virginia, I would like to take a moment to set forth the events leading to the construction of the Brick Wall (The Wall) which currently divides the properties.

In 1975, I purchased 1814-16 Park Ave., (the Sussex) with a partner. We took title in the name of Park Sussex Associates, (PSA). In the summer of 1978, PSA decided to convert the apartment building to a condominium. For tax purposes, we created Park Sussex Development Corp. (PSDC), and conveyed title to the property. I was president and 50% owner of SDC. It was my role to manage the whole conversion process as well as all renovations to

the building and property. In that capacity, I determined that it was essential to replace a decaying and unattractive fence which defined the back (north) and west side boundaries. I approached the then owners of the adjoining west property, 1818-20 Park Ave, Walter and Barbara Bass, to enlist their cooperation, guidance and, perhaps, support regarding that portion of The Wall which would continue to be our mutual boundary.

I discussed with the Basses the nature and design of The Wall as well as the costs for that portion which was common to our respective properties. The Basses were comfortable with the plans and agreed that the old wooden fence needed replacing. They further agreed to share in the expenses for the mutual portion (50/50). We also, jointly and mutually, decided to place the wall exactly where the former wooden fence was. Neither of us felt that a survey was necessary since the wooden fence appeared to be the property line.

The Wall was erected during the summer of 1978, in its current location. It was paid for jointly by the then owners of the two adjoining properties. Its location was jointly agreed upon by the then owners of the two properties. It has stood there, without protest, for the past 24 years.

Regards,
/S/
Jeffery J. Rawn

The signature on the attached letter, addressed to The Sussex Association, regarding the origin of the brick wall, which forms a boundary between 1814-16

Park Ave, "The Sussex Condominium" and 1818-20 Park Ave. is the signature of Jeffrey J.Rawn of Chicago, IL.

I hereby attest to the foregoing as of 29 October, 2002.
Christine R. Swink
Notary Public /SEAL/

Record, p. 86.

Walter Bass Memo sent to Parker, December 6, 2002

6 December 02

To Whom it may concern:

I owned 1818-1820 Park Avenue, Richmond, Virginia, during the 70s through the 90s. In the late 70s Jeff Rawn, a next door neighbor, informed me that he had planned to build a brick wall between our properties. The wall was to be built between the Sussex and the Gloucester apartment buildings. Jeff Rawn asked if I would be willing to pay half of the cost. I did, which seemed the neighborly thing to do.

/S/
Walter H. Bass III

Jeffery Rawn Email sent to Parker, February 19, 2003

"To set the record straight, Walter Bass and I never entered into any easement agreement verbal or otherwise. We simply agreed to build the wall where we built it, without having the line surveyed. The Sussex Association is entitled to an easement by virtue of the length of time which has elapsed without objection by the previous owners."

SUSSEX 0296 Record p.82.

STATEMENT FROM JOHN G. LESTER, L.S

I am the licensed surveyor who prepared the survey plat dated October 19, 1978, entitled "The Sussex 'A Condominium' City of Richmond, VA", for Jeffery Rawn when his company converted the real estate located at 1814-1816 Park Avenue to the Sussex Condominiums. When preparing the plat, I relied on the field notes of Mr. Albis, a surveyor for my company, Lewis & Owens, Inc., copies of which are attached to this statement as Exhibits No. 1-1 to 1-3. I also relied on Jeffrey Rawn's response to my questions, attached Exhibit No. 6, my common practice when ancillary issues not included in the field notes are involved.

Mr. Albis' notes show that we did a whole property survey locating the points from Meadow Street to Allen Avenue, from Park Avenue to the alley behind the property. We also located the footprint of the building and described other points of interest on the Sussex property as well as the abutting property on the west, owned by Walter Bass at 1818-1820 Park Avenue. Those points of interest included an old fence located on the Bass property. My drawing (plat), taken from those notes, is attached to this statement as Exhibit No. 2 and it was attached to the Declaration for the Sussex Condominiums as Exhibit C-1 .

Mr. Albis' notes showed an old fence, located entirely on the Bass parcel, in the rear yard of the Bass property, the same fence drawn on my plat, Exhibit No. 2. It was located inside the Bass parcel, 0.96' west from the Sussex boundary line on the Park Avenue end, and, 1.90' inside the Bass' property near the alley. The old fence is also shown on Exhibit No.

3, the 1952 plat made by Chas. H. Fleet & Assoc., and usually called "the City Plat." This plat is referred to in the call on the deed transferring the Sussex property to Jeffrey Rawn and his partner. DB ref :d702 page 1818, Exhibit No 9.

After I reviewed Mr. Albis' notes, I called Mr. Rawn, asking for additional instruction as to how he wanted several details depicted on the final plat. My notes are attached as Exhibit No. 6. Question 4 concerned "Fence or any other improvements/ additions." Mr. Rawn instructed me to draw a brick fence to enclose the rear yard, evidently a work in progress, locating it on the property line between his property and the Bass property and extending along the rear property line of Mr. Rawn's parcel, with the alley. But for the fact that Mr. Rawn told me that he and Mr. Bass had agreed on this location, I would not have included that detail on my drawing. Therefore, my survey plat, Exhibit No 2, also shows "Brick Fence Not Yet Completed," located on the common boundary between the Sussex parcel and the Bass parcel.

I have also reviewed notarized statements made by Jeff Rawn, Exhibit No. 7, and Walter Bass, Exhibit No. 8, concerning these same events. They agree on three important points: first, there was an old fence; second, it would be replaced with a brick fence located on the mutual boundary line; and third, they would share the cost (50/50), a common practice with such projects on abutting property. However, Mr. Rawn's claim that the old fence was either

wooden or located on the property line is clearly not accurate. [1] The survey showed that the fence was not on the property line. Mr. Rawn then filed my plat and included it in the Declaration for the Sussex Condominiums, as Exhibit C-1. Walter Bass states that Rawn did not show him this 1978 plat and that he was completely surprised that the brick wall was built completely on his property.

I have also reviewed two later plats: first, a 2001 plat of the Bass parcel, which I understand is now owned by Mrs. Agnew, Bass' successor, attached to this statement as Exhibit No. 4, and second, a 2008 Sussex plat, attached as Exhibit No. 5. Both plats show the property line between the Sussex and Bass (now Agnew) parcels in essentially the same location as my earlier 1978 plat. Notably, both recent plats show a brick wall located on the Bass/Agnew parcel in the same location as the old fence, to which I referred above, and which is shown on my plat, Exhibit No. 2 .

Therefore, in my opinion, there is no boundary issue here because all the boundary lines shown on all the survey plats are essentially congruent. However, the two recent surveys, Exhibits 4 and 5, show that the Brick Wall was clearly built on the old fence line, entirely on the Bass parcel, not on the common boundary line where I was advised by Mr. Rawn to draw it on my plat.

---

[1] The Albis' notes depict two fences. The "old fence," located on the Bass' property and the current site of the brick fence, was a wire fence, depicted by an "x" between lines. A wooden fence, depicted by an " " " between the lines, was located about 4.5 Ft. inside the Sussex property, running from the rear corner of the building toward the alley.

___/S/_____
John G. Lester, L.S.

Commonwealth of Virginia
County of Henrico, to wit,

The foregoing "Statement of John G. Lester, L.S.", was sworn and subscribed to before me on this 11 of May, 2009, by John G. Lester.

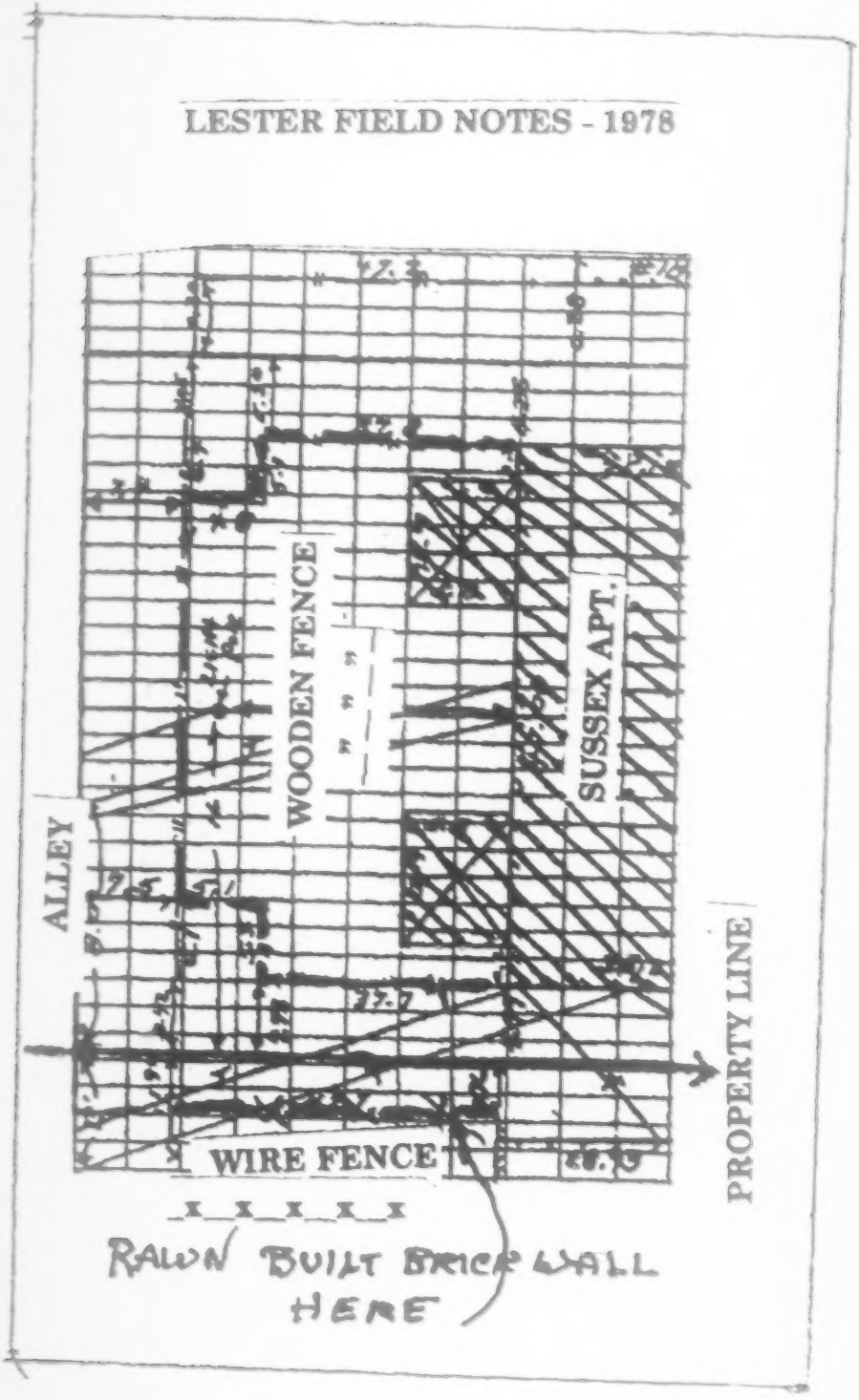
Rebecca E. Woods
Notary Public
My commisstion expires: August 31, 2011
Registration No.145468

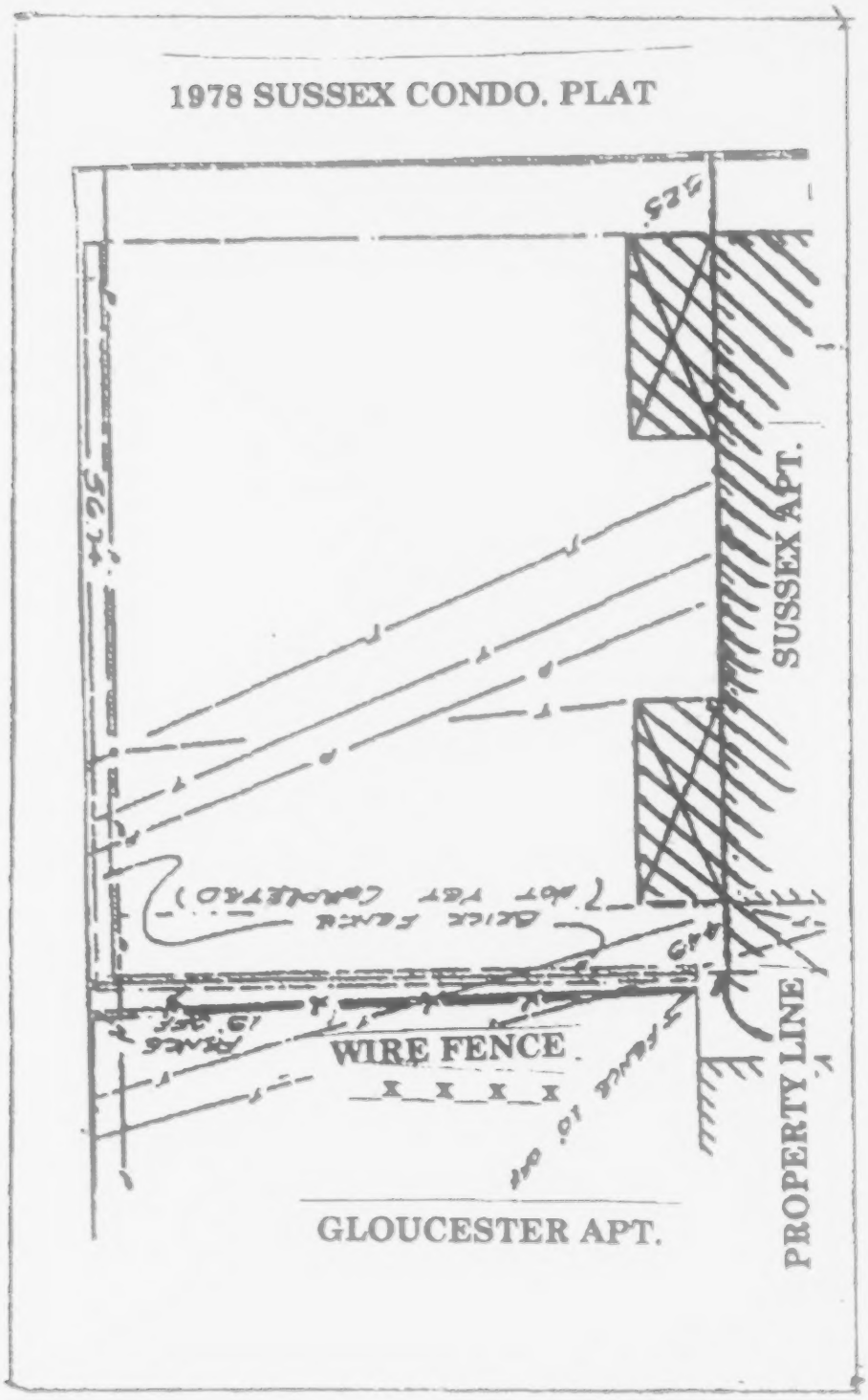
ATTACHED NOTES: 1814 Park Ave.

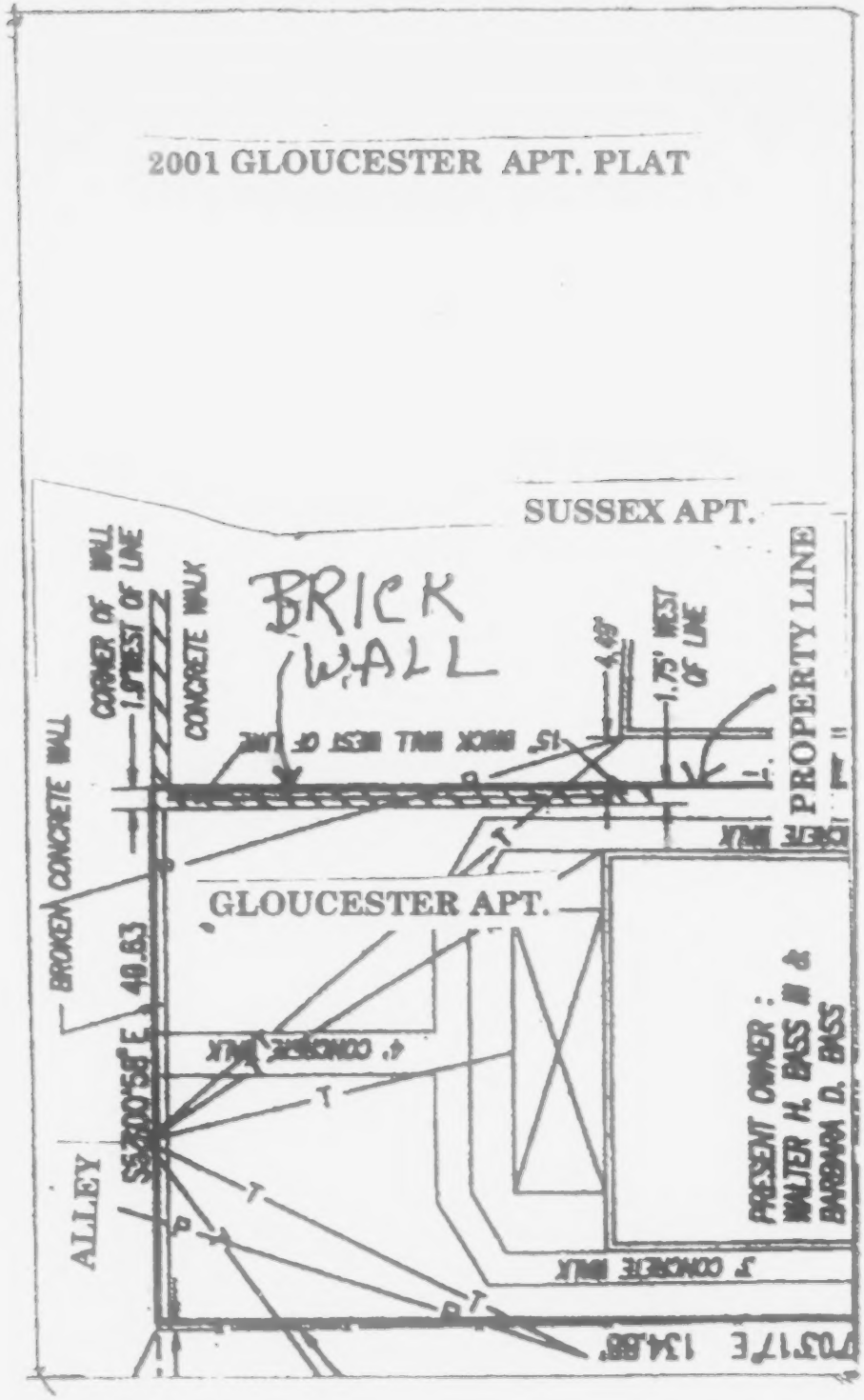
Questions:
1. Name - The Sussex "A Condo"
2. Storage Areas
3. Common & Limited Common Elements
4. Fence or any other improvements/additions
5. Brick patios type in front, what will happen to those or C.E.

Plat
1. Sections thru floor
2. **Fence under construction "Not Yet Completed."**

LESTER FIELD NOTES - 1978




1978 SUSSEX CONDO. PLAT
SUSSEX APT.
WIRE FENCE
GLOUCESTER APT.
PROPERTY LINE


2001 GLOUCESTER APT. PLAT
SUSSEX APT.
BRICK WALL
CORNER OF WALL 1.5' WEST OF LINE
CONCRETE WALK
1.75' WEST OF LINE
PROPERTY LINE
BROKEN CONCRETE WALL
GLOUCESTER APT.
40.83
ALLEY
PRESENT OWNER :
WALTER H. BASS
BARBARA D. BASS

Opinion from William Jeffries, Esq., Kane Jeffries, (wlj@kanejeffries.com)

To: Marian Agnew,
Date: October 14, 2008:

Marian,

"At the time the brick wall was built, Jeff Rawn knew that the wooden fence was on the Bass parcel - his 1978 Survey shows it. If Rawn had shown the 1978 plat to Bass at the time the brick wall was built, Bass would have known that the wooden fence was on the Bass parcel and probably would not have agreed that the wooden fence was on the property line, as is inferred from Rawn's letter. It is likely that either Bass was mistaken or was tricked. Rawn's successor in title should not profit from the mistake (mistake by Bass) or trick."

Record p. 87.

Revised Statement from Walter Bass

After reading the Statement from John Lester, the surveyor who drew the 1978 Sussex Condominium plat, reading his notes and reexamining that plat in detail, I am revising my statement, made in November 2008, as follows:

In 1974, my partner and I owned an apartment building, the Sussex, at 1814-1816 Park Avenue, Richmond, Virginia. I also owned the adjacent building, the Gloucester, at 1818-1820 Park Avenue, Richmond, Virginia. In 1975, we sold the Sussex to Jeff Rawn and his partner. At that time, Mr. Rawn's family lived in the Sussex and my wife and I lived in the Gloucester.

Jeff Rawn became President of the Park Sussex Development Corporation in 1978 and managed the conversion of the Sussex to condominiums. At that time, Jeff approached me to enlist my cooperation in order to build a brick wall in the back yard on the boundary between my property (the Gloucester) and his (the Sussex). I asked if he knew where the property line was located. He told me that he did and marked the spot and insisted that was where it should be built. We discussed the design and cost of the brick wall. I agreed to pay a portion of it. Jeff had the brick wall constructed.

I did not know until I recently received a copy of the survey plats of both the Sussex and Gloucester property, now owned by Mrs. Agnew that the brick wall was not built on the mutual boundary between the Sussex and the Gloucester. Instead, it was built entirely on the land of the Gloucester, which had been my property at that time. This came as a complete surprise to me. I presumed that when Jeff Rawn and I had our conversation that the brick wall was to be built on our mutual boundary, as he has stated in his notarized letter to Mr. Parker, and that he knew where that boundary was located.

I saw a copy of the 1978 Sussex condo plat that was recorded with the declaration which converted the Sussex to condominiums, for the first time several months ago. When Jeff approached me about the location and design of the brick wall, he did not show this to me. It clearly shows the property line and the proposed location of the brick wall on the mutual boundary. It also shows a fence on my property near the eastern boundary. If Jeff had shown me the plat, I would have been comfortable with the plans because it shows "a Brick Fence (not yet completed)" drawn on the mutual property line, as Jeff had stated when he asked me to pay for half the cost. I do not remember the wire fence that the surveyor drew on the east side of my property in that same general location. (There was another wire fence on the west side that I replaced with a board fence.) Both wire fences were very dilapidated and this one was probably overgrown with creeper vines. I do remember an old wooden

fence that ran from the rear corner of Jeff's building back toward the alley, probably five feet on the Sussex property. That fence is also shown on the 1978 plat.

I now understand that the 2001 plat done for Mrs. Agnew, shows that Jeff had the brick wall built in the same location as the eastern wire fence shown on the 1978 plat., not straddling the property line I now believe that I had been deceived.

At that time, I assumed that Jeff knew the importance of respecting boundary lines since he was a very experienced developer and banker. To me, it is obvious that the wall belongs to Mrs. Agnew since it is completely located on her property.

/S/
Walter Bass

Commonwealth of Virginia
City/County of Halifax, to wit:

Sworn and subscribed to before me by Walter Bass, this 21st day of May, 2009.

Betsy S. Warren /S/
Notary Public
My Commission expires: 06-30-2011
Registration No. 751724

Case No. CLO8005626-00

Record pp. 433-441.

(entered January 19, 2010)

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

The Sussex Condominium Unit Owners Association

Plaintiff,

v.

Marian K. Agnew,

Defendant.

DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION IN LIMINE

Defendant, Marian K. Agnew, hereby opposes and objects to further Sussex efforts to violate her right to due process by preventing introduction of truthful evidence conclusively showing that Agnew cannot and has not trespassed on her own property. Agnew asserts that she neither trespassed nor damaged Sussex property when she demolished part of an offensive brick structure deliberately built in 1978 on her predecessor's property and continuing in violation of the criminal provisions of the Virginia Condominium Act, § 55-79.103. [1]

[1] This case, unsupported by fact or law, was brought for the Plaintiff Sussex Association by the attorney who is also *pro se* without disclosing his *pro se* interest on submitted documents. He owns an equal undivided interest in the common area enclosed by the brick fence, and occupies one-of-two ground-floor condominiums with direct access to the enclosed garden. The other is owned by the Sussex Declarant who has admitted violating the criminal provisions of the Virginia Condominium Act, § 55-79.103 when he filed a fraudulent condominium plat that showed the brick fence "not yet completed" on the property line, not the place where it was finally built.

SUMMARY

The Sussex has moved to exclude nearly all of Agnew's properly proffered truthful and well-substantiated evidence disproving its case for trespass and conversion. An overwrought and distorted interpretation of Agnew's former statements attempts to limit her evidence to the misperception that this court's recent interlocutory decision (now on appeal) had already divested the disputed area of her Gloucester property to the Sussex at the time she removed part of the offensive structure. The Sussex has not listed any exhibit amending Agnew's deed that has been of record since 2001. Unless and until the Sussex can prove that the disputed property has been conveyed to the Sussex as of the time of her alleged trespass, Sussex' trespass and conversion issues are not ripe. Finally, the Sussex has not pleaded the requisite elements of trespass in its verified complaint.

Agnew objects to the inclusion of the November 10, 2008, Statement from Walter Bass attached to Agnew's Answer, Sussex Exhibit 1. Bass' Statement was revised and replaced after he reviewed documents obtained in discovery, notably the John Lester Statement and Sussex condominium plat. It is therefore, attached and submitted with Agnew's exhibits as Revised Statement of Walter Bass, dated May 21, 2009.

Agnew's trial exhibits prove that Sussex officers, Parker and Rawn, have consistently acknowledged her title to and possession of all property west of the Gloucester/Sussex boundary. Until opposing counsel

moved into the Sussex, they negotiated with Agnew in good faith to resolve the property line dispute. Agnew will show that no one representing the Sussex accused her of trespass or conversion until this case was filed in December, 2008. Agnew witness, surveyor John Lester, will present evidence relating to the amount of land involved and the location of the Gloucester/Sussex property line that has not moved since the offensive brick fence was surprisingly built on Gloucester property after the Sussex condominium plat was filed. Last week, opposing counsel deposed Agnew witness, Jim Anderson, by phone without Agnew's knowledge. Therefore, Anderson's testimony must be permitted.

ARGUMENT

1) The Sussex Verified Complaint, fails to plead the essential elements of trespass: possession and occupation of the land.

"[A] trespass is an unauthorized entry onto property which results in interference with the property owner's possessory interest therein." 5 Richard R. Powell, The Law of Real Property p. 707 (Patrick J. Rohan ed., 1994). Thus, in order to maintain a cause of action for trespass to land, the plaintiff must have had possession of the land, either actual or constructive, at the time the trespass was committed. Kessler v. Fentress 248 Va 423, Blackford v. Rogers, 2 Va.Dec. 292, 294, 23 S.E. 896, 897 (1896) (emphasis added.)

"A litigant's pleadings are as essential as his proof, and a court may not award particular relief unless it is substantially in accord with the case asserted in those pleadings. Brooks v. Bankson, 248 Va. 197, 206,

445 S.E.2d 473, 478; Gwinn v. Collier, 247 Va. 479, 484, 443 S.E.2d 161, 164; Ted Lansing Supply Co. v. Royal Aluminum & Constr. Corp., 221 Va. 1139, 1141, 277 S.E.2d 228, 229. Thus, a court is not permitted to enter a decree or judgment order based on facts not alleged or on a right not pleaded and claimed. Hensley v. Dreyer, 247 Va. 25, 30, 439 S.E.2d, 372, 375; Harrell v. Woodson, 233 Va. 117, 121, 353 S.E.2d 770, 773; Ted Lansing Supply Co., 221 Va. at 1141, 277 S.E.2d at 229; see Ainslie v. Inman, 265 Va. 347, 356, 577 S.E.2d 246, 251; Smith v. Sink, 247 Va. 423, 425, 442 S.E.2d 646, 647." Jenkins v. Bay House, 266 Va. 39 (2003)."

The rationale supporting this basic rule is plain. As we have stated, "[e]very litigant is entitled to be told by his adversary in plain and explicit language what is his ground of complaint or defense. . . . The issues in a case are made by the pleadings, and not by the testimony of witnesses or other evidence." Ted Lansing Supply Co., 221 Va. at 1141, 277 S.E.2d at 230 (quoting Potts v. Mathieson Alkali Works, 165 Va. 196, 207, 181 S.E. 521, 525)." Id., at 41.

Count III: Trespass, of the Sussex' Verified Complaint, Exhibit 2, does not assert that Agnew committed a trespass on land possessed by the Sussex; only that Agnew entered and interfered without authorization with the Sussex' interest and right in the Wall. Facts 14 and 15 of the Sussex Verified Complaint claim ineffectively that the Sussex "used and maintained the property on the east side of the wall"; and that the Sussex "claimed and continues to claim ownership of both the portion of the Agnew property upon which the wall is built and the additional portion of the Agnew property east of the wall, together, ("The disputed Property")." Only Sussex Count I: adverse possession, claims

"continuous possession," an inchoate executory interest still unrealized.

In so stating, the Sussex not only admits that Agnew occupied and possessed the disputed property at the time of the alleged trespass, but also fails to claim that it had possession of either the offensive brick wall or occupancy of Agnew's abutting property at that time. These are the essential elements of trespass that Agnew intends to prove by her exhibits and testimony. Put simply, the Sussex has put the cart before the horse, attempting to bootstrap a claim for damages on the expectation of a future possessory interest in Agnew's property. The Sussex cannot now amend its pleadings to include them or attempt to confuse the Court by misrepresenting Agnew's admissions or its own recent letter Opinion.

Based on these allegations, the trespass and conversion issues pleaded by the Sussex are without foundation. The total absence from these pleadings of any claim that the Sussex occupied or possessed the Wall or disputed property at the time Agnew allegedly trespassed precludes the Court from concluding that Agnew trespassed; and from imposing a remedy based on such facts not alleged. See Sink, 247 Va. at 425, 442 S.E.2d at 647; Hensley, 247 Va. at 30, 439 S.E.2d at 375; Harrell, 233 Va. at 121, 353 S.E.2d at 773.

Until this case was brought in December 2008, the pleadings show that Agnew was never provided notice that the Sussex claimed actual possession of her property[2] The absence of notice was especially detrimental to Agnew. Her garden renovation plans have been delayed for seven years because the design

[2] Sussex President Lee Parker's November 8, 2002 and February 26, 2003 letters do not mention trespass.

depends on the area of land west of the property line as well as the eventual fate of the offending brick fence. The plaintiffs bore the burden of proof on that issue. See Boerner v. McCallister, 197 Va. 169, 175, 89 S.E.2d 23, 27. Thus, Agnew was placed in the untenable position of bearing the burden of proof on an issue that Sussex did not identify in its pleadings.

2) Agnew's exhibits will show that she had rightful possession and authority to notify the Sussex that the offensive brick fence was located on her property and that she intended to demolish part of it.

Agnew's adverse witness, Sussex President, Parker, will testify that the Sussex has had actual notice since 2002 that the wall was on Agnew's property. He will state that, when Agnew discovered the offending brick wall on her property, she gave him a copy of her 2001 plat and notified him that the that the wall and abutting property was located on her property, in her possession; and that the wall would be removed at a later date when she renovated her garden. (The Sussex 2008 plat also shows that the offensive brick fence, partially demolished by Mrs. Agnew, is not located on Sussex property.) Agnew's recorded deed and plat, showing that she has title to the property upon which the offensive brick fence is located, are also in the record. Therefore, the record will show that the Sussex had ample notice of the wall demolition based on Agnew's 2001 plat and the Sussex 2008 plat that corroborates Agnew's ownership of the property.

3) Agnew's exhibits will show that the Sussex did not warn Agnew that she would trespass if she demolished the wall, did not respond to Agnew's notification, and did not forbid her from planting a

garden upon her own property where the wall had been removed on her side of the property line.

Code § 18.1--173 provides, in pertinent part: 'If any person shall without authority of law go upon or remain upon the building or premises of another . . . after having been forbidden to do so, either orally or in writing, by the owner, lessee, custodian or other person lawfully in charge thereof . . . he shall be deemed guilty of a misdemeanor . . ..' This statute is applicable to public as well as to private property. Johnson v. Commonwealth, 212 Va. 579, 186 S.E.2d 53, cert. denied, 407 U.S. 925, 92 S.Ct. 2458, 32 L.Ed.2d 812 (1972)

. Listed Agnew/Sussex correspondence shows that Agnew advised the Sussex in April, 2008 that she had a demolition permit from the City acknowledging her possession and intent to remove part of the offending brick fence from her property. The Sussex did not respond with a warning claim of trespass. At the time part of the offensive brick fence was demolished in June, 2008, the Sussex did not respond with a warning claim of trespass. Until this case was filed in 2009, the Sussex had made no other warning claim of trespass. Moreover, Agnew's evidence will show that no tenant residing in the Sussex has claimed that she either trespassed or converted Sussex property until this case was filed in 2008. Therefore, the Sussex can show no warning claim of trespass orally or in writing forbidding Agnew from demolishing part of the offending wall.

CONCLUSION

Agnew must be given due process by permitting her to introduce at trial her listed exhibits showing that the Sussex pleadings are fatally flawed; to present evidence connecting and explaining exhibits

already in the record proving that Agnew did not trespass when she removed an offending brick wall from her property; to prove that she provided fair notice to the Sussex and received no responsive warning of trespass; that no one claimed trespass or conversion until this case was filed - long after the fact. Finally, Sussex trespass and conversion issues cannot mature until the appeal of the interlocutory Order is heard.

Respectfully submitted,

/S/

Marian K. Agnew, pro se
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(804) 359-8248

CERTIFICATE OF SERVICE

I, Marian K. Agnew, hereby certify that DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION IN LIMINE was on this 12th day of January, 2010, faxed at (804) 697-1339, and sent electronically to Opposing Counsel and Joshua D. Heslinga, P.O Box 1122, Richmond VA 23219-1122, Counsel for Plaintiff Sussex Condominium Association.

Marian K. Agnew

Tax ID - W0000861085

CITY OF RICHMOND -
OFFICE OF THE ASSESSOR OF REAL ESTATE

OPPOSING COUNSEL	Unit 1, 1814 Park Avenue, Richmond Va 23220
01/01/07	$388,000
01/01/08	$419,000
01/01/200	$419,000
01/01/2009 Office review	$318,000
09/03/08 sale from Burgess to opposing counsel	$250,000

City of Richmond
Office of the Assessor of Real Estate
Regina Randolph, Supervisor
/S/